Supreme Court, U.S.
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No. 05-810

In The
# Supreme Court of the United States

THOMAS BRYANT,

*Petitioner,*

vs.

METRIC PROPERTY MANAGEMENT, INC.,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did Petitioner/Plaintiff raise a genuine issue of material fact as to whether he exercised due diligence – as required by Texas state law – in obtaining service of process on Defendant/Respondent under Federal Rule of Civil Procedure 56? The record reflects the presence of a fact issue regarding Petitioner's exercise of diligence in executing service of process on Respondent/Defendant, which is sufficient under Federal Rule of Civil Procedure 56 to prelude the issuance of summary judgment.

## PARTIES TO THE PROCEEDING

**Petitioner** Mr. Thomas Bryant was the Plaintiff in the District Court and the Appellant in Fifth Circuit Court of Appeals.

**Respondent** Metric Property Management, Inc., a manager of the Stonegate Villas Apartment complex located in Fort Worth, Texas was one of three Defendants in the District Court, and the sole Appellee in Fifth Circuit Court of Appeals.

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | iv |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| STATEMENT OF THE CASE | 2 |
| I. Nature of the Case | 2 |
| II. Procedural Background | 4 |
| III. Facts | 6 |
| REASONS FOR REVIEW | 8 |
| Reason 1 | 8 |
| CONCLUSION | 16 |

APPENDIX

**A** *Bryant v. Stonegate Villas*, No. 04-10941 in the United States Court of Appeals for the Fifth Circuit, 142 Fed. Appx. 809 (5th Cir. August 1, 2005) (per curiam) (designated not to be published under 5th Cir. R. 47.5) ..... A-1

**B** *Bryant v. Metric Property Management, Inc.*, 2004 WL 1359526 (N.D. Tex., June 17, 2004) (not reported in F.Supp.2d) ..... B-1

**C** Fifth Circuit Court of Appeals denial of petition for rehearing in No. 04-10941, signed September 19, 2005 and filed September 29, 2005 ..... C-1

## TABLE OF AUTHORITIES

Page

UNITED STATES COURT OF APPEALS CASES

*Bryant v. Stonegate Villas*, 142 Fed. Appx. 809 (5th Cir. 2005) ..... 1, 8

*Saenz v. Keller Industries of Texas, Inc.*, 951 F.2d 665 (5th Cir. 1992) ..... 11

UNITED STATES DISTRICT COURT CASES

*Bilsing v. State Industries*, 173 F. Supp. 2d 593 (S.D. Tex. 2001) ..... 9

*Bryant v. Metric Property Management, Inc.*, 2004 WL 1359526 (N.D. Tex. 2004) ..... 1

TEXAS STATE COURT CASES

*Allen v. Bentley Laboratories*, 538 S.W.2d 857 (Tex. Civ. App. – San Antonio 1976, writ ref'd n.r.e.) ..... 10

*Broom v. MacMaster*, 992 S.W.2d 659 (Tex. App. – Dallas 1999, no pet.) ..... 15

*De La Torre v. Our Lady of Guadalupe Center*, 807 S.W.2d 889 (Tex. App. – Corpus Christi 1991, no writ) ..... 10

*Gant v. DeLeon*, 786 S.W.2d 259 (Tex. 1990) ..... 9, 11, 14

*Hansler v. Mainka*, 807 S.W.2d 3 (Tex. App. – Corpus Christi 1991, no writ) ..... 10

*Hodge v. Smith*, 856 S.W.2d 212 (Tex. App. – Houston [1st Dist.] 1993, writ denied) ..... 9, 12, 14

*Instrument Specialties Co. v. Texas Employment Commission*, 924 S.W.2d 420 (Tex. App. – Fort Worth 1996, writ denied) ..... 10

TABLE OF AUTHORITIES – Continued

Page

*Keeton v. Carrasco*, 53 S.W.3d 13 (Tex. App. – San Antonio 2001, no pet.) ..... 10, 11, 12, 14

*Matthews Construction Co. v. Rosen*, 796 S.W.2d 692 (Tex. 1990) ..... 14, 15

*Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348 (Tex. 1990) ..... 15

*Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826 (Tex. 1990) ..... 9, 11

*Ray v. O'Neal*, 922 S.W.2d 314 (Tex. App. – Fort Worth 1996, no writ) ..... 10

*Tate v. Beal*, 119 S.W.3d 378 (Tex. App. – Fort Worth 2003, pet. denied) ..... 9, 10

*Valdez v. Charles Orsinger Buick Co.*, 715 S.W.2d 126 (Tex. App. – Texarkana 1986, no writ) ..... 11

*Walls v. Travis County*, 958 S.W.2d 944 (Tex. App. – Austin 1998, pet. denied) ..... 14

*Weaver v. E-Z Mart Stores, Inc.*, 942 S.W.2d 167 (Tex. App. – Texarkana 1997, no writ) ..... 11

*Zale Corp. v. Rosenbaum*, 520 S.W.2d 889 (Tex. 1975) ..... 11

*Zimmerman v. Massoni*, 32 S.W.3d 254 (Tex. App. – Austin 2000, pet. denied) ..... 9

STATUTES:

28 U.S.C. § 1332(a) ..... 4, 7

28 U.S.C. § 1954 ..... 2

TABLE OF AUTHORITIES – Continued

Page

RULES OF COURT

Fed. R. Civ. P. 56 ..... *passim*

Sup. Ct. R. 13 ..... 2

## PETITION FOR WRIT OF CERTIORARI

Petitioner, Thomas Bryant, respectfully petitions this Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit, 142 Fed. Appx. 809 (5th Cir. Aug. 1, 2005) (App. A), due to the existence of a genuine issue of material fact under Federal Rule of Civil Procedure 56 with respect to the applicability of a Texas state two-year statute of limitations, given summary judgment evidence that Petitioner used due diligence in properly effectuating service of process on the defendant after the lawsuit had been filed within the statute of limitations period.

## OPINIONS BELOW

1. The United States District Court for the Northern District of Texas, Fort Worth Division, dismissed Petitioner's personal injury and property damage lawsuit in an unpublished opinion dated June 17, 2004. *Bryant v. Metric Property Management, Inc.*, 2004 WL 1359526 (N.D. Tex. 2004). Appendix B.

2. The United States Court of Appeals for the Fifth Circuit affirmed the decision of the District Court in an unpublished, *per curiam* opinion dated August 1, 2005. *Bryant v. Stonegate Villas,* 142 Fed. Appx. 809 (5th Cir. Aug. 1, 2005). Appendix A.

3. The United States Court of Appeals for the Fifth Circuit denied Petitioner's petition for rehearing in an unpublished order dated

September 19, 2005 and filed September 29, 2005. Appendix C.

## JURISDICTION

This is a petition seeking the writ of certiorari from a case pending in a United States Court of Appeals. The United States Court of Appeals for the Fifth Circuit issued its unpublished opinion affirming judgment of District Court on August 1, 2005. App. A. Thereafter, the Court of Appeals denied a timely filed Petition for Rehearing on September 19, 2005. App. C. This Court has jurisdiction based on section 1954 of title 28 of the U.S. Code because this Petition for Writ of Certiorari was filed within ninety (90) days after the Fifth Circuit Court of Appeals denied Petitioner's timely filed petition for rehearing. Sup. Ct. R. 13.

## STATEMENT OF THE CASE

### I. Nature of the Case

This personal injury and property damage case arises out of Petitioner's residency at an apartment complex located in Fort Worth, Texas. The suit is governed by Texas state substantive law.

Petitioner received bodily injury as a result of his exposure to toxic mold while residing at the complex; at the same time, his personal property was damaged as a result of being exposed to mold while in the complex.

Respondent is a management company of the apartment complex.

The District Court determined that – as a matter of Texas state law – Petitioner's tort claims were time-barred because he did not exercise due diligence in **effectuating service of process** on Respondent, even though the lawsuit had been timely **filed** within two years as required by Texas law. *See* App. B. The Court of Appeals affirmed. *See* App. A.

Both holdings are incorrect, however, because Plaintiff/Petitioner raised a genuine issue of material fact as to whether he exercised due diligence in obtaining service of process on Respondent after the suit was on file. Fed. R. Civ. P. 56. Because substantial, uncontroverted evidence reflects Petitioner used diligence to serve process, the decision of the Court of Appeals should be reversed and the case allowed to proceed. In addition, the decisions below ignore the fact that Petitioner's claim includes a count for breach of warranty that is governed by a four-year limitations period under Texas law.

Petitioner respectfully requests this Court's discretionary review because the decisions below are rooted in federal summary judgment procedure and involve the quantum of evidence necessary under Federal Rule of Civil Procedure 56 to raise a genuine issue of material fact. The interpretation given this Rule by the courts below as applied to these facts has impeded his right to receive due process of law in a civil proceeding.

## II. Procedural Background

Petitioner Thomas Bryant became ill and experienced property damage as a result of living in the Stonegate Villas Apartment complex during late 2000. He became aware of the origins of his problems, however, in early 2001 as a result of a diagnosis he received from Dr. Rea in January 2001 and a written report from expert Greg Upah about his personal property in February 2001.

Petitioner filed his initial lawsuit against Respondent (and others) on September 28, 2001 in Texas state district court – within the two-year statute of limitations. This lawsuit was dismissed without prejudice by unopposed motion on November 1, 2001, however, due to the fact that the Petitioner's health prevented him from traveling to a court-mandated settlement conference.

Thereafter, on October 25, 2002, Petitioner filed the suit from which this proceeding arises in the 17th District Court of Tarrant County, Texas. As part of this proceeding, one of the several Defendants – a manager of the Stonegate Villas Apartments, Metric Property Management, Inc. – was served with process on March 18, 2003. Record on Appeal to Fifth Circuit (ROA), Vol. 1, at p. 150.

After this second, state-court suit was on file, the defendants removed it to the U.S. District Court for the Northern District of Texas, Fort Worth Division, based on complete diversity of citizenship between the parties. 28 U.S.C. §1332(a). ROA, Vol. 1, at pp. 1-3.

Once in federal district court, Defendants moved for summary judgment arguing, *inter alia*, that Petitioner's

Texas law tort claims were barred by the two-year statute of limitations provided by Texas state law. ROA, Vol. 1 at pp. 137-138.

Petitioner responded to the motion for summary judgment. ROA, Vol. 1 at p. 187. At that time, there were two additional Defendants in the lawsuit beside Respondent, and Petitioner agreed they should be dismissed. ROA, Vol. 1 at p. 194. Hence, only Respondent Metric Property Management, Inc. remained as a party defendant in the lawsuit.

On June 17, 2004, the District Court granted Respondent Metric's Motion for Summary Judgment in its entirety, dismissing Petitioner's claims against Respondent Appendix B.

Thereafter, Plaintiff moved for new trial (ROA Vol. 2 at p. 38), which the District Court denied (ROA Vol. 2 at p. 426).

Plaintiff timely filed a notice of appeal (ROA Vol. 2 at p. 430).

On August 1, 2005, the Court of Appeals for the Fifth Circuit, in a panel consisting of Circuit Judges Reavley, Higginbotham, and Clement issued a *per curiam*, non-published opinion (App. A) affirming the District Court's decision. The appellate court concluded that Petitioner failed to timely effect service of process on Respondent: "Although in November of 2000 Bryant resided in the apartment alleged to be contaminated, he failed to bring suit until October of 2002 and then failed to serve the defendant until March of 2003. As to both the personal injury and property damage claims, summary judgment was warranted because Bryant failed to file suit and